

Before the
Federal Communications Commission
Washington, DC 20554

FILED/ACCEPTED

APR 11 2007

Federal Communications Commission
Office of the Secretary

In the Matter of:)
)
The LuCa group, inc.) CG Docket No. 06-181
) CSR-CC-0148
Video Programming Accessibility)
)
Petition for Exemption of Closed)
Captioning Requirements)

To: Office of the Secretary

MOTION TO STRIKE AND
PRECAUTIONARY REPLY

The LuCa group, inc. ("LuCa"), by counsel, herby files this Motion to Strike and Precautionary Reply. On December 29,2005, LuCa filed a petition with the FCC requesting that pursuant to Section 79.1 of the Rules it be exempt from the requirement of the FCC's closed captioning rules. On December 18,2006, it supplemented its showing with a declaration from its Vice President of Operations.

On November 7,2006, the FCC placed 494 petitions for exemption, including LuCa's Petition, on public notice. Oppositions to the Petition were due by November 27,2006. A coalition of hearing advocacy groups requested a 120-day extension of time in which to file oppositions against the parties seeking exemption from the FCC's closed captioning rules. By Public Notice, DA 06-2329, released November 21, 2006, the FCC granted the Motion for Extension of Time

On March 2,2007, Telecommunications for the Deaf and Hard of Hearing, Inc. ("TDI"), National Association for the Deaf ("NAD"), Deaf and Hard of Hearing Consumer Advocacy Network ("DHHCAN"), Hearing Loss Association of America ("HLAA"), Association of Late-Deafened Adults, Inc. ("ALDA"), American Association of People with Disabilities ("AAPD"),

No. of Copies rec'd 0 + 4
List A B C D E

and California Coalition of Agencies Serving the Deaf and Hard of Hearing (“CCASDHH”) (collectively the “Advocacy Groups”) filed an Opposition to LuCa’s Petition for Exemption.

The Advocacy Groups are Not Interested Persons Within the Meaning of the FCC’s Rules.

Section 79.1 (f) (6) of the FCC’s rules provides that “any interested person may file comments or oppositions to the petition” for exemption.’ The Advocacy Groups are not interested persons within the meaning to the FCC rules and the Administrative Procedure Act.² The Advocacy Groups do not allege that the FCC’s grant of the above captioned Petition in any way would injure them or any of their members. Nor do they claim that any member regularly watches LuCa’s programs. The Advocacy Groups have not shown how the FCC’s grant of the Petition for Exemption would cause them or their members harm. Without a showing of an injury-in-fact, the Advocacy Groups are not “interested persons.” Therefore, they do not have standing to participate in this proceeding.

The Administrative Procedure Act provides that an “interested person” may appear before an agency for the presentation, adjustment, or determination of an issue. 5 U.S.C.A. § 555(b). The Court of Appeals has held that the injury-in-fact rule for standing of *Sierra Club v. Morton*, 405 U.S. 727, 733, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972) covers the “interested person” language of the Administrative Procedure Act. *Trustees for Alaska v. EPA*, 749 F.2d 549, 554 (9th Cir. 1984) (adopting the analysis in *Montgomery Environmental Coalition v. Costle*, 207 App. D.C. 233, 646 F.2d 568, 578 (D.C. Cir. 1980)). Compare. In *the Matter of Cox Communications, Inc.*, 14 FCC Rcd 11716

¹ 47 C.F.R. § 79.1 (f)(6).

² 5 U.S.C.A. § 555(b).

(1999) (Petitioners are not "interested persons" outside of the area where they are cable subscribers.)

The "irreducible constitutional minimum" for standing is that the appellant was injured in fact, that its injury was caused by the challenged conduct, and that the injury would likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992); *Microwave Acquisition Corp. v. FCC*, 330 U.S. App. D.C. 340, 145 F.3d 1410, 1412 (D.C. Cir. 1998).

Associations, such as the Advocacy Groups, have standing to sue on behalf of their members only if (1) at least one of the members would have standing to sue in his own right, (2) the interest the association seeks to protect is germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member participate in the lawsuit. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

Generally, the Commission accords party in interest standing to a petitioner that demonstrates either residence in the station's service area, or that the petitioner listens to or views the station regularly.³ *Chet-5 Broadcasting, L.P.* 14 FCC Rcd 13041 (1999). In this case, Advocacy Groups should have demonstrated that at least one of their members resides in the service area of a station that broadcasts LuCa's programming, and that the member regularly views the programming. The Advocacy Groups have not provided the statement of a single member who claims to be aggrieved or adversely affected by the grant of LuCa's Petition for Exemption of the Closed Captioning rules. The Advocacy Groups lack standing to oppose LuCa's Petition for Exemption of the Closed Captioning

¹ 47 U.S.C. §309 (d)(1) ("Any party in interest may file with the Commission a petition to deny. . .")

rules. Accordingly, the Commission should strike the Advocacy Groups' Opposition without consideration

Procedural Defects

The Advocacy Groups' Opposition has numerous procedural defects. Section 1.49(a) of the Commission's Rules provides that all pleadings must be double-spaced. The Advocacy Groups' Opposition is single-spaced. Further, had the Advocacy Groups properly spaced the Opposition it would have exceeded ten double spaced pages. Section 1.49(b) and (c) provide that all pleadings exceeding ten pages shall contain a table of contents and a summary. The Advocacy Groups' Opposition contains neither a table of contents nor a summary. These procedural defects provide a separate and independent reason for striking the Advocacy Groups' defective Opposition.

Precautionary Reply

A review of the filings made by the Advocacy Groups in CG Docket No. 06-181 shows that the Advocacy Groups filed numerous cookie-cutter, one-size-fits-all pleadings. In the case of LuCa, the text of the Advocacy Groups' Opposition does not match the facts as presented in LuCa's Petition. For example, on page 5 of the Opposition the Advocacy Groups, without any explanation or correlation to the facts claim that LuCa "has not provided sufficient financial information to determine whether an undue burden would result." Nothing could be further from the truth. As LuCa stated in its supplemental Declaration,

In order to implement an in-house closed captioning department, we estimate an additional \$16,250 per month in payroll and subcontractors fees, \$60,000 in capital expenditures for edit bays and \$24,000 for office expansion, for a total first year outlay of \$270,000. The

closed captioning costs would result in an additional net loss of -.4%, which would be a total loss of -1.6%.

The Advocacy Groups fail to address LuCa's statement that providing closed captioning would result in a net loss to LuCa's business, yet in their cookie-cutter pleading they somehow claim that LuCa has failed to demonstrate that an undue burden would result. The FCC should not consider such one-size-fits-all advocacy.

It would be futile to address the Advocacy Groups' Opposition point by point, since the Advocacy Groups have made no effort to connect the uncontested facts set forth in LuCa's Petition and supplement with the relevant FCC rules and regulations. By way of further example, the Advocacy Groups claim that LuCa failed to provide sufficient information that it could not receive closed captioning assistance from the distributors of its programming. LuCa is a producer of program-length commercials for car dealerships, car insurance companies and other businesses wishing to advertise their products or services on television. In addition to producing commercials, the LuCa Group purchases broadcast time from local television stations located primarily in the Los Angeles television market. As LuCa clearly states,

The LuCa Group produces an average of about 15 new program-length commercials in English and Spanish per week. The LuCa Group does not make money on production. Because the LuCa Group competes with, radio and newspaper advertising, it is limited to what it can charge for production. Our production net profit margin is a negative 1.2%. The LuCa Group makes its money on the 15% sales commission we receive from the television stations.

If The LuCa Group is required to provide closed captioning for the commercials it produces, I believe that the net result will be that our clients' advertising business will migrate to radio and newspaper competitors, causing economic loss to

both The LuCa Group and the local television stations which currently air these commercials.

The Advocacy Groups do not dispute LuCa's showing that it will not be able to pass the costs of closed captioning to its advertisers. Nor do they dispute LuCa's showing that the television stations it buys time from would not be willing to pay the additional fees for closed captioning. LuCa's showing that it will suffer an undue burden is conclusive and unchallenged. Accordingly, the FCC should grant its Petition for exemption of Section 79.1 of the FCC's rules.

Conclusion

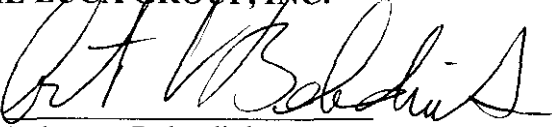
The Advocacy Groups lack standing to file an Opposition to LuCa's Petition for Exemption. Additionally, their pleading contains numerous procedural errors. Accordingly, FCC should dismiss the Advocacy Groups' Opposition without consideration

Even if the Commission should consider its one-size-fits-all pleading, what could it make of such a disjointed document? The Advocacy Groups accept all of LuCa's factual showings. The Advocacy Groups merely provide a legal memo which fails to connect the FCC rules with the facts of this case (or apparently any other case). What is the point of such a pleading? Apparently the Advocacy Groups have determined that no programmer, regardless how small or how deserving, should ever be granted an exemption. Without examining or challenging the facts, the Advocacy Groups have

concluded that none of the 494 petitions for exemption listed in the FCC's November 7, 2006 Public Notice should be granted an exemption. Thus, the Advocacy Groups would rather put hundreds of small program producers out of business, rather than concede that occasionally there is a need for an exemption of the Commission's rules. The FCC should not countenance such shameful and selfish conduct. The Advocacy Groups' Opposition, to the extent the FCC considers it at all, should be summarily denied,

Respectfully submitted,

THE LUCA GROUP, INC.

By 
Arthur V. Belendiuk
Its Attorney

Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, N.W
Suite 301
Washington, DC 20016

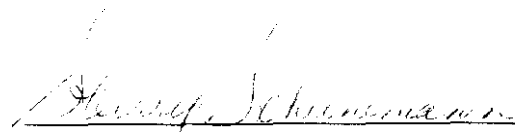
(202) 363-4559

April 11, 2007

CERTIFICATE OF SERVICE

I, Sherry L. Schunemann, a secretary in the law office of Smithwick & Belendiuk, P.C., do hereby certify that a copy of the foregoing "Motion to Stroke and Precautionary Reply" was mailed by First Class U.S. Mail, postage prepaid, this 11th day of **April**, 2007 to the following:

Paul O. Gagnier, Esquire
Troy F. Tanner, Esquire
Danielle C. Burt, Esquire
Bingham McCutchen LLP
2020 K Street, N.W.
Washington, D.C. 20007



Sherry L. Schunemann